

No. 15,149

United States Court of Appeals
For the Ninth Circuit

WIEN ALASKA AIRLINES, INC.,
Appellant,

vs.

SAMUEL SIMMONDS, Administrator of
the Estate of Martha Simmonds,
Deceased, for the benefit of Samuel
Simmonds, and the children of the
Deceased, namely, Leona Simmonds,
Nellie Simmonds, Doreen Simmonds,
Eli Simmonds, Margaret Simmonds
and Arnold Simmonds,

Appellee.

BRIEF FOR APPELLEE.

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BRIEF FOR APPELLEE.

STATEMENT OF CASE.

The statement of the case of the appellant is substantially correct but it might not be amiss to add the following:

In 1955 the statute relating to wrongful death was amended and is quoted as Appendix A of appellant's brief. The amount recoverable was changed to \$50,000.00 and the statute specifically provided for

the introduction of evidence as to the accumulation, contributions for support, loss of assistance or service, loss of consortium, prospective training and education, and medical and funeral expenses, although this statute did not specifically limit the court to such evidence.

The appellee moved to apply the 1955 statute. The court denied the motion insofar as the amount was concerned. The question of the applicability of the new statute on evidential grounds was not raised.

The court held that under the prior statute the instruction given was applicable. The question therefore, which is principal in this case, is whether or not the proper measure of damages, either under the new statute or the old statute, is limited to what the deceased would probably have earned by her intellectual or bodily effort or labor in her business or profession during the remainder of her life which, to the extent of her net savings, would have gone to the benefit of her estate.

SUMMARY OF ARGUMENTS.

The position of the appellee is:

I. that the wrongful death statute, 61-7-3, A.C.L.A., as amended in 1955 by Chapter 153, Session Laws of Alaska, is applicable to wrongful death actions pending at the time of its enactment; and

II. that even if the statute as amended in 1955 did not apply to this action, the court was

still correct in applying the measure of damages outlined in its Instruction No. 15 (Transcript Record page 24).

ARGUMENT I.

Chapter 153 of the Session Laws of Alaska, 1955, provides as follows:

“CHAPTER 153

An Act; relating to damages in actions for wrongful deaths; amending Sec. 61-7-3, A.C.L.A. 1949, as amended by Chap. 89, S.L.A. 1949.

Be it enacted by the Legislature of the Territory of Alaska:

Section 1. Section 61-7-3, A.C.L.A. 1949, as amended by Chapter 89, Session laws of Alaska, 1949, is hereby amended to read as follows:

Sec. 61-7-3. Action for Wrongful Death: Disposition of amount recovered. When the death of a person is caused by wrongful act or omission of another, the personal representatives of the former may maintain an action therefor against the latter, if the former might have maintained an action, had he lived, against the latter for an injury done by the same act or omission. Such action shall be commenced within two years after the death, and the damages therein shall not exceed fifty thousand dollars, and the amount recovered, if any, shall be exclusively for the benefit of the decedent's husband or wife and children when he or she leaves a husband, wife or children, him or her surviving; or leaving no husband, wife

or children surviving then and in that event, for the benefit per capita of the child or children of the decedent's child or children, if any, and the surviving parent or parents of the decedent. When the Plaintiff prevails, the trial court shall determine the allowable costs and expenses of the action and may, in its discretion, require notice and hearing thereon. The amount recovered shall be distributed only after payment of all costs and expenses of suit and debts and expenses of administration.

The damages recoverable under this Act shall be limited to those which are the natural and proximate consequence of the negligent or wrongful act or omission of another.

In fixing the amount of damages to be awarded under this Act, the Court or jury shall consider all the facts and circumstances and from them fix the award at such sum as will fairly compensate for the injury resulting from the death. In determining the amount of the award, the Court or jury shall consider but is not limited to the following:

(1) Deprivation of the expectation of pecuniary benefits to the beneficiary or beneficiaries, without regard to the age thereof, that would have resulted from the continued life of the deceased and without regard to probable accumulations or what the deceased may have saved during his lifetime.

(2) Loss of contributions for support.

(3) Loss of assistance or services irrespective of age or relationship of decedent to the beneficiary or beneficiaries.

(4) Loss of consortium.

(5) Loss of prospective training and education.

(6) Medical and funeral expenses.

The death of a beneficiary or beneficiaries before judgment shall not affect the amount of damages recoverable hereunder.

The right of action hereby granted shall not be abated by the death of a person named or to be named the defendant.

Approved March 28, 1955''.

At the risk of being elementary, the nature and facts of statutes should be reviewed. We quote from Cooley's Blackstone, 3rd Ed., Vol. 1, pp. 85-86:

"Statutes also are either 'declaratory' of the common law, or 'remedial' of some defects therein. Declaratory, where the old custom of the kingdom is almost fallen into disuse, or become disputable; in which case the parliament has thought proper 'in perpetuum rei testimonium', and for avoiding all doubts and difficulties, to declare what the common law is and ever hath been.

Remedial statutes are those which are made to supply such defects and abridge such superfluities, in the common law, as arise either from the general imperfection of all human laws, from change of time and circumstances, from mistakes and unadvised determinations of unlearned (or even learned) judges, or from any other cause whatsoever. And this being done, either by enlarging the common law where it was too lax and luxuriant, hath occasioned another subordinate division of remedial acts of parliament into 'enlarging' and 'restraining' statutes.

. . . The rules to be observed with regard to the construction of statutes are principally these which follow.

There are three points to be considered in the construction of all remedial statutes; the old law, the mischief, and the remedy; that is, how the common law stood at the making of the act; what the mischief was, for which the common law did not provide; and what remedy the parliament hath provided to cure this mischief. And it is the business of the judges so to construe the act as to suppress the mischief and advance the remedy.”

The signal case defining the place of damages in a cause of action is *United States v. Standard Oil Company of California*, 21 F. Supp. 645, District Court, S.D., California, N.D., Dec. 4, 1937. The case was affirmed by the Ninth Circuit Court of Appeals in 107 F. 2d 402. Certiorari was denied by the United States Supreme Court 307 U.S. 673; petition for re-hearing denied 309 U.S. 697. Plainly, any constitutional question was thoroughly examined.

At page 660, 21 F. Supp., the argument of the Government was set forth wherein the right to receive interest from the date of conversion of property was claimed as a vested right immune from statutory interference. The court said:

“. . . No constitutional structure can be erected upon a remedy or part of a remedy, such as interest, the allowance of which, at common law, was discretionary. What is discretionary cannot be set up as a right, so as to withstand legislative change.

“(230-28) The argument to the contrary overlooks the place of damages in a cause of action. At the risk of being elementary, it is well to define certain terms—the more so as they have been, at times, a source of confusion. The right of action is merely the right to pursue a remedy. The cause of action is the concurrence of the facts which give rise to an enforceable claim.

“As said in *Hutchinson v. Ainsworth*, 1887, 72 Cal. 452, 15 P. 82, 84, 2 Am. St. Rep. 823: ‘The facts upon which the plaintiff’s right to sue is based, and upon which the defendant’s duty has arisen, coupled with the facts which constitute the latter’s wrong, make up *the cause of action*’.

“A more extended definition is contained in *Frost v. Witter*, 1901, 132 Cal. 421, 64 P. 705, 707, 84 Mm. St. Rep. 53: ‘The action therefore springs from the obligation, and hence the “cause of action” is simply the obligation. This is in accordance with the view of Mr. Pomeroy, though expressed by him in new and somewhat awkward terms. *Pom. Pl. & Prac.* 453. The obligation thus constituting the cause of action may be either *ex contractu* or *ex delicto*; and, again, the latter may be either for compensation or damages, or for restitution, as e. g., the obligation of a wrongdoer to restore the property of another; for, though there is a distinction between actions brought for the recovery of damages or compensation and those brought for restitution, the former constituting actions *in rem* and the latter actions *in personam*, yet in either case the action is to enforce an obligation; nor can there be an action for any other purpose. 1 Am. Jur. 527. The “cause of action” is therefore to be distinguished

also from the “remedy”, which is simply the means by which the obligation or the corresponding action is effectuated; and also from the “relief” sought. *Pom. Pl. & Prac.* 453’. (Italics added.)

“Damage is not the cause of action. It is merely a part of the remedy which the law allows for the injury resulting from a breach of wrong. *Frost v. Witter*, *supra*; *Hurt v. Haering*, 1922, 190 Cal. 198, 211 P. 228, 229, *Bliss on Code Pleadings*, 1879, 113-117;

“*Phillips on Code Pleading*, 1896, 32, 33; *Clark on Code Pleading*, 1928, pp. 78-87; *Yankwich on California Pleading*, 1926, 82; 1 *Cor. Mur.*, p. 939; and cases cited in notes 20-26; 1 *C.J.S.*, *Actions*, 8(h) pp. 986, 987; *Foot v. Edwards*, 1855, 9 *Fed. Cas.* p. 358, No. 4, 908; *Box v. Chicago, Rock Island & Pacific R. R. Co.*, 1899, 107 *Iowa* 660, 78 *N.W.* 694, 698; and see *Silas A. Harris*, ‘What is a Cause of Action’, 1929, 16 *Cal. Law Rev.* 459.’”

“While a litigant may acquire a vested right to be compensated for loss immune from legislative encroachment by retroactive statute (*Pritchard v. Norton*, 1882, 106, *U.S.* 124, 132, *L. S. Ct.* 102, 27 *L. Ed.* 104, *Gibbs v. Zimmerman*, 1933, 290 *U.S.* 326, 332, 54 *St. Ct.* 140, 142, 78 *L. Ed.* 342), no vested right exists ‘in the measure of compensation’.”

We then approach the question of whether under the law of Alaska this statute is retroactive. Section 19-1-1, A.C.L.A. 1949.

“Sec. 19-1-1. Effect of repeals or amendments. The repeal or amendment of any statute shall not affect any offense committed or any act done or

right accruing or accrued or any action or proceeding had or commenced prior to such repeal or amendment; nor shall any penalty, forfeiture, or liability incurred under such statute be released or extinguished, but the same may be enforced, continued, sustained, prosecuted and punished under the repealing or amendatory statute save as limited by the *ex post facto* and other provisions of the Constitution, in which event the same may be enforced, continued, sustained, prosecuted and punished under the former law as if such repeal or amendment has not been made. (S.L.A. 1947, Chap. 18, 1, p. 60.)”

Let us now analyze this statute:

a. The repeal or amendment of any statute shall not affect offenses committed or any acts done or right accruing or accrued on any action or proceeding had or commenced prior to such appeal or amendment. This clearly states that no cause of action shall be affected by repeal or amendment. The statute then specifically continued “nor shall any penalty, forfeiture, or liability incurred under such statute be released or extinguished, but the same may be enforced, continued, sustained, prosecuted and punished under the repealing or amendatory statute *save as limited by the ex post facto and other provisions of the Constitution*. This clearly means that unless a constitutionally protected right is interfered with by the amendment, that the action shall be prosecuted under the amendatory statute.

b. Therefore, if no constitutional structure can be erected upon the remedy and no constitutional right in

the remedy has been interfered with, then under the provisions of Section 19-1-1 the same should be prosecuted and continued and enforced under the amendatory statute.

Appellee argued at the trial of the case that the measure of fifty thousand dollars should be applied under the 1955 statute. The court applied the fifteen thousand dollar measure of damages. Appellee believes this was wrong but, since only eleven thousand five hundred dollars was obtained, appellee was in doubt as to whether the appellate court would consider that the appellee had been injured by the failure to apply the fifty thousand dollar amount. That question must later come before this court in other cases yet to be tried. But, since the appellant chose to appeal and other cases are yet to be tried involving these same questions, it is considered proper to fully brief the matter of the applicability of the new statute as well as the old statute of Alaska, as the same pertains to their effect upon the measure of damages in Alaska. Since it may not be possible for the attorney for appellee to be present at the oral argument of this case, every effort has been made to clearly outline appellee's position. The opinion of the trial court as to the measure of damages appears in the transcript of the record beginning at page 16.

Appellee believes that the trial court erred in its construction of Section 19-1-1 and in applying the rule cited in its opinion, transcript record page 16. The statutes involved were not identical or similar to the Alaska statute and ignored the distinction between

the right of action, the cause of action, the claim and the remedy as distinguished in *United States v. Standard Oil*, 21 F. Supp. 645, District Court S.D., California, N.D., Dec. 4, 1937.

ARGUMENT II.

The trial court applied the correct measure of damages in its Instruction No. 15.

Hansen v. Hayes, 154 P. 2d 202, states the rule under the Oregon statute, O.C.L.A. Section 8-903, where there are named beneficiaries surviving, the damages are measured by "the pecuniary benefits which those beneficiaries might reasonably be expected to have derived from the deceased had his life not been terminated; and where no named beneficiaries survive, the damages would be measured by the 'benefit of the estate' rule". That rule is applicable to the Alaska statute.

WRONGFUL DEATH STATUTES.

"There is a distinction in the nature and measure of damages to the injured person, or a right given to the surviving spouse or dependents, or a statutory right for the benefit of the estate." *The Princess Sophia*, 35 F. 2d 736, 738.

To the injured person:

Survival statutes have the nature of allowing recovery by the personal representative of the deceased in the same manner and form as if the deceased, him-

self, had brought the action. The measure of damages is consistent with the nature including pain, suffering, etc.

A right given to the surviving spouse or dependent:
Lord Campbell's Act, 1846 (9 and 10 Vict. C. 93).

This statute was enacted substantially by New York in 1847, and by Illinois in 1853, the latter providing:

“Every such action shall be brought by and in the names of the personal representatives of such deceased person, and the amount recovered in every such action shall be for the exclusive benefit of the widow and next of kin of such deceased person, and shall be distributed to such widow and next of kin in the proportion provided by law in relation to the distribution of personal property left by persons dying intestate; and in every such action the jury may give such damages as they shall deem a fair and just compensation, with reference to the pecuniary injuries resulting from such death to the wife and next of kin of such deceased person, not exceeding the sum of five thousand dollars: provided, that every such action shall be commenced within two years after the death of such a person.” (*Wilcox v. Bierd et al.*, 162 N.E. at page 174, Sec. 2.)

Versions of Lord Campbell's Act have the nature of allowing recovery by the personal representatives of the deceased for the exclusive benefit of named survivors. The measure of damages is consistent with the nature by fairly and justly compensating the named beneficiaries for the pecuniary injuries to them

by the death. A statutory right for the benefit of the estate:

Loss to estate statutes take the general form of the Oregon statute prior to its admendment in 1939:

“Death from Injury, When Representatives may Sue for; Limitations. When the death of a person is caused by the wrongful act or omission of another the personal representatives of the former may maintain an action at law therefor against the latter, if the former might have maintained an action, had he lived, against the latter for an injury done by the same act or omission. Such action shall be commenced within two years after the death, and damages therein shall not exceed \$7,500, and the amount recovered, if any shall be administered as other personal property of the deceased person. (L. 1862; D. Sec. 367; H. Sec. 371; B & C Sec. 381; L. 1907, C. 72.)” (Section 380, O.C., 1920.)

They have the nature of allowing recovery by the personal representatives of the deceased for the loss sustained by the estate. The measure of damages is consistent with the nature by compensating the estate for what the deceased would likely have provided for an estate had he lived a life expectancy. See *Parham v. Portland Electric Co.*, 33 Ore. 451, 53 P. 14, 24, 40 L.R.A. 799, 72 Am. St. Rep. 730; *Carlson v. Ore. Short Line & U.N. Ry. Co.*, 21 Ore. 450, 28 P. 497, 499.

ALASKA WRONGFUL DEATH STATUTE.

Much has been said about the intentions of Congress in 1900 in providing Section 353, Alaska Code of Civil Procedure; even more has been said and relied upon concerning the substantial identity of the wrongful death statutes of Alaska and Oregon, the binding authority of Oregon decisions, and legislative ratification of all. The cumulative result is confusion and loss of the rightful distinction in the nature and measure of damages under the Alaska Wrongful Death Statute.

As part of the Act of June 6, 1900, 31 Stat. 392, now appearing as Section 61-7-3, A.C.L.A. 1949, amended by Chapter 89, S.L.A. 1949, the action for wrongful death provides:

“Action for wrongful death: Disposition of amount recovered. When the death of a person is caused by the wrongful act or omission of another, the personal representatives of the former may maintain an action therefor against the latter, if the former might have maintained an action, had he lived, against the latter for an injury done by the same act or omission. Such action shall be commenced within two years after the death, and the damages therein shall not exceed fifteen thousand dollars, and the amount recovered, if any, shall be exclusively for the benefit of the decedents husband or wife and children when he or she leaves a husband, wife, or children, him or her surviving; and when any sum is collected it must be distributed by the plaintiff as if it were unbequeathed assets left in his hands, after payment of all debts and expenses of ad-

ministration, and when he or she leaves no husband, wife or children, him or her surviving, the amount recovered shall be administered as other personal property of the deceased person; but the plaintiff may deduct therefrom the expenses of the action, to be allowed by the proper court upon notice, to be given in such manner and to such persons as the court deems proper. Approved March 23, 1949.”

Application of the distinction in the nature of damages to the Alaska Statute reveals (1) recovery by the personal representatives of the deceased for the exclusive benefit of decedent’s husband or wife and children, and (2) recovery by the personal representatives of the deceased of an amount to be administered as other personal property when he or she leaves no husband, wife or children him or her surviving. This distinction in the nature of damages carries with it the measure of damages consistent with the nature; namely (1) fair and just compensation of the named survivors for the pecuniary injuries to them by the death, and (2) compensation to the estate for what the deceased would likely have provided for an estate had he lived the life expectancy.

Part of this statute was construed by the Court of Appeals of this Circuit in *Jennings v. Alaska Treadwell Gold Mining Co.* (C.C.A. 9th, 1909), 3 Alaska Fed. 350, 170 Fed. 146.

In this case Judge Morrow said “The Alaska Code of Civil Procedure is substantially the same as the Oregon Code” which is perhaps as far as some counsel

have read, for the confusion in Alaska today as to the interpretation of the Alaska Wrongful Death Statute would be non-existent had a thorough reading and understanding of Judge Morrow's decision been undertaken.

The single question of the nature and measure of damages was under consideration. Judge Morrow compared the Oregon and Alaska statutes; he noted the provision in the Alaska Code for the exclusive benefit of named survivors, but he said “. . . that provision has no bearing on this case as the deceased left no surviving wife or children.” The Judge went on in his analysis of the Alaska statute to determine what happened when there was a wrongful death action for a single man and the statute said, “The amount recovered shall be administered as other personal property of the deceased person.” Judge Morrow said “This last provision, it will be observed, is identical with the Oregon Code.” He thereupon and only in the consideration of damages in the death of a man leaving no wife or children examined the decision of the Supreme Court of Oregon in the case of *Parham v. Portland Electric Co.*, 33 Ore., 451, 53 Pac. 14, 24, 40 L.R.A. 799, 72 Am. St. Rep. 730.

Judge Morrow reasoned,

“It is true that the two statutes are not identical as a whole, but the change in the Alaska Code from the Oregon Code makes more definite and certain the purpose of Congress to adopt the construction of the Supreme Court of Oregon for estates, WHERE THE DECEDENT LEFT NO HUSBAND WIFE OR CHILDREN.”

Judge Morrow in effect said that the Alaska Code relating to wrongful death presents dual natures and measures of damages; that he was concerned with only one nature and measure, as the decedent left no wife or children; that since the *part* of the Alaska Statute he was concerned with was the *whole* of the Oregon statute, he would follow the Oregon interpretation. He then applied this reasoning to the case before him and gave the opinion that under the Alaska statute when the decedent left no husband, wife or children, the nature of damages would be loss to the estate, and the measure of damages consistent with the nature would be "earning capacity, thriftiness, and probable length of life of the deceased, and the consequent amount of probable accumulations during the expectancy of such life."

For a number of years following the *Jennings v. Treadwell* (supra) decision, it appears that the Alaska actions for wrongful death were actions in which no husband, wife or children survived the decedent; the nature of the damages sought being "loss to the estate" and the measure of damages consistent with the nature what the deceased would have provided for an estate. The Oregon decisions were applicable and were correctly followed. *Caswell v. Copper River and N. W. Ry.*, 4 Alaska 709 (1913); *Koske v. Alaska Juneau Gold Mining Co.*, 6 Alaska 334.

In 1939 the original Oregon law was revised and now appears in 1 Oregon Compiled Laws, Section 8-903, as follows:

"When the death of a person is caused by the wrongful act or omission of another, the personal

representatives of the former for the benefit of the widow or widower, or surviving dependents, and in case there is no widow or widower, or surviving dependents, then for the benefit of the estate of the deceased, may maintain an action at law therefor against the latter, if the former might have maintained an action, had he lived, against the latter, for an injury done by the same act or omission. Such action shall be commenced within two years after the death, and damages therein shall not exceed \$10,000."

Only at this point did the Oregon and Alaska statutes become substantially identical throughout in that both provided (1) a version of Lord Campbell's Act, and (2) a benefit of estate action.

In 1943 in the case of *Kreidler v. Ketchikan Spruce Mills*, 10 Alaska 365, four children survived the deceased. Judge Alexander in quoting from Section 3845, C.L.A. 1933, under which the action was brought said "and it also provides: 'and the amount recovered, if any, shall be exclusively for the benefit of the decedent's husband or wife and children, him or her surviving; and when any sum is collected it must be distributed by the plaintiff as if it were unbequeathed assets left in his hands, after payment of all debts and expenses of administration'." The District Judge continues, "This section of our statute was taken from the Oregon Code, and the measure of damages laid down by the Oregon Supreme Court in the early case of *Carlson v. Ore. S. L. & U.N. Ry. Co.*, 21 Ore. 450, 28 P. 497, is still followed.

In actions brought under this section, the true measure of damages, as stated in that case, "is the pecuniary loss suffered by the estate, without any solatium for the grief and anguish of surviving relatives or pain and suffering of the deceased; and that loss would be what the deceased would have probably earned, etc."

Judge Alexander erred in saying the quoted section of the Alaska Statute was taken from the Oregon Code, as that particular provision for the benefit of the named survivors antedated the similar Oregon provision by 39 years. Following this false premise the old decision of the Oregon Supreme Court was relied on and a measure of damages inconsistent with the nature of the action was applied.

In *Dralle v. Steele*, 1952, 13 Alaska 680, Judge Dimond, in ruling on motions in a wrongful death action in which a widow and child survived, recognized the confusion in previous cases. He said,

"It is too plain for argument that Congress in passing the Act of June 6, 1900, did not adopt the Oregon statute on this subject but instead reverted more nearly to the text of the original Lord Campbell's Act, still retaining however, that part of the Oregon statute which provides for a recovery by the estate in the event the decedent left no husband, wife or children . . . It is therefore obvious that any decision based upon the Oregon law, as it existed on June 6, 1900, can be of little use in construing the Alaska Act in any case where there is a surviving husband, wife or children, and is likely to be completely misleading.

In any case where there is no surviving husband, wife or children, then the Alaska Statute may be and has been construed to the same effect as the Oregon law. *Jennings v. Alaska Treadwell*, supra, *Kreidler v. Ketchikan Spruce Mills* (incorrectly cited in support of this point), *Linge's Administrator v. Alaska Treadwell Co.*, 1906, 3 Alaska 9. But the authority of the Oregon decision ends there."

Judge Dimond turned to the "views of the highest court of some state (New York) which has a statute substantially similar to that of Alaska." *Hamilton v. Erie R. Co.* (1916), 219 N.Y. 343, 114 N.E. 399, 402, and *Meekin v. Brooklyn Heights Ry. Co.* (1900), 164 N.Y. 145, 58 N.E. 50, 51 L.R.A. 235. After establishing the nature of damages to the benefit of the surviving widow and children he examined the measure of damages and concluded that "recovery must be limited to pecuniary damages suffered by the wife and children . . ." (p. 688.)

According to Appellant's Appendix No. B, Judge Dimond, in this same case, issued to the jury Instruction No. 8, in which he said "The true measure of damages is the pecuniary loss suffered by the estate". Truly a paradox, but consistent with the inconsistencies which Judge Dimond himself sought to eliminate.

The Princess Sophia (C.C.A. 9th, 1932), 61 F. 2d 339, 35 F. 2d 736, does not support appellant's position. The District Court, W. D. Washington, N. D., in adjudging under the Alaska statute the sufficiency of more than 200 claims (the Commissioner having

allowed each claimant the \$10,000 limit, and the petitioner having excepted to each allowance), said at p. 738 "There is a distinction in the nature and measure of damages to the injured person, or a right given to the surviving spouse or dependents, or a statutory right for the benefit of the estate. In the first would be included pain, suffering, etc.; . . . In the second, loss to the beneficiary, which would include loss to the named person by way of contribution, support, including elements which may not be approximated in money, such as love and affection, aside from the financial loss; third, to the estate, where it is made as nearly as may be to the financial returns which could reasonably be expected, what investments or savings have been effected during the lifetime, the reasonable expectancy or certainty of continued savings, and giving consideration to his age, health, habits, disposition, and capacity to labor and to save, what would he likely have provided for an estate had he lived the life expectancy". The foregoing is the rule of recovery applied by Judge Neterer to the evidence to sustain and deny the exceptions as to the claimants. To the claims for named beneficiaries the court was not warranted "in finding a pecuniary loss where none is shown by the evidence", and as to the claims for the benefit of the estate the court required "some evidence of accumulation and saving habit," there being "no conflict of evidence, but failure of evidence."

The Circuit Court of Appeals, Ninth Circuit, reviewed and affirmed all of the District Court's findings except

“The one assignment of error not passed upon is the one relating to the holding and finding of the court that the evidence was not sufficient to sustain the Commissioner’s findings, and award of damages in favor of a hundred or more claimants . . . Apparently after payment of court costs and other costs on appeal, nothing will be left to be distributed among the claimants . . . and we think it needless.”

Appellee concludes that in the instant case the correct measure of damages has been applied.

Dated, Fairbanks, Alaska,

October 15, 1956.

Respectfully submitted,

ROBERT A. PARRISH,

Attorney for Appellee.